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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

Interworks Unlimited, Inc., a
California corporation,

Plaintiff,

V.

Digital Gadgets, LLC., a New Jersey limited liability company,

Defendant.

Digital Gadgets, LLC., a New Jersey
limited liability company,

Counterclaimant,

V.

Interworks Unlimited, Inc., a
California corporation,

Counter-defendant

) **Case No. 2:17-cv-4983 AB TJH**
) **KSx)**
) **PLAINTIFF INTERWORKS**
) **UNLIMITED, INC.’S REPLY TO**
) **DEFENDANT DIGITAL**
) **GADGETS, LLC’S OPPOSITION**
) **TO MOTION FOR SUMMARY**
) **JUDGMENT; MEMORANDUM**
) **OF POINTS AND AUTHORITIES**
)
) **Date: January 7, 2019**
) **Time: UNDER SUBMISSION**
) **Courtroom: 9B**

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1 **I. INTRODUCTION**

2 The facts here are relatively simple. Defendant Digital Gadgets, LLC
3 (“Defendant”) obtained and failed to pay for over a million dollars’ worth of
4 hoverboards from Interworks Unlimited, Inc. (“Plaintiff”). After being pressed
5 for payment, Defendant tried to dodge and weave its way out of liability by
6 claiming that the hoverboards were defective and refused to either pay or return
7 the hoverboards. After Plaintiff brought suit, Defendant filed a bogus
8 counterclaim, again trying to dodge and weave its way out of responsibility. After
9 Plaintiff brought a Motion for Summary Judgment on both its Complaint and
10 Defendant’s Counterclaim (“MSJ”), Defendant, rather than actually raise triable
11 issues of fact, presented the court with its Opposition (“Opposition”) that, rather
12 than set out good faith issues of fact, mimicked its previous actions by throwing
13 smoke screens and engaging in an all-out campaign to mislead the court in an
14 attempt to, again, dodge and weave liability. Ultimately, the buck stops - or
15 rather, starts - here.

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1 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. NO TRIABLE ISSUE OF MATERIAL FACT IS PRESENTED**
 3 **IN DEFENDANT’S SEPARATE STATEMENT OF MATERIAL**
 4 **FACTS.**

5 Defendant’s Response to Plaintiff’s Statement of Uncontroverted Facts
 6 (“Undisputed Facts”) fails to raise a single, triable issue of material fact.
 7 Defendant has not set forth any indicia of evidence to show that the goods were
 8 rejected in any way. Defendant has not alleged the existence of a written
 9 exclusivity agreement, failing to address the crux of Plaintiff’s arguments.
 10 Undisputed Facts ¶ 12 – 13. Defendant acknowledges that it failed to pay
 11 Defendant for the hoverboards (Undisputed Facts ¶ 37) and acknowledges that it
 12 did not return the hoverboards. Undisputed Facts ¶ 43-44.

13 Interestingly, what the Defendant *does* do is attempt to interject some
 14 reason for not returning the hoverboards by stating that “Defendant received a
 15 letter from Cash Capital Group, LLC advising Defendant of their security interest
 16 in and among other things, future accounts where ever located.” Undisputed
 17 Facts ¶ 43-44. However, as elaborated on below, Cash Capital Group, LLC was
 18 never assigned the invoices related to transactions between Plaintiff and
 19 Defendant. Further, the question remains unanswered – if Defendant did not
 20 return the goods because of the letter from Cash Capital Group, LLC, then why
 21 didn’t they forward any payment or return the hoverboards to Cash Capital
 22 Group, LLC? Finally, Defendant does not, at any point, allege that they notified
 23 Plaintiff that they either sought to repair or return the hoverboards. Accordingly,
 24 Plaintiff is entitled to Summary Judgment.

25 **B. PLAINTIFF HAS STANDING TO BRING THESE CLAIMS.**

26 Defendant tries to knock out a home run by arguing that Plaintiff lacks
 27 standing to bring this suit because the relevant invoices were assigned to Bibby
 28

1 Financial Group, Inc. ("Bibby") and Cash Capital Group, Inc. ("CCG").

2 Defendant primarily relies on three pieces of evidence in support:

- 3 • "Agreement for the Purchase and Sale of Future Receipts" ("Agreement for
- 4 Sale" herein), attached as Defendant's Exhibit ("DE") 4;
- 5 • UCC Financing Statements for Cash Capital ("Financing Statements") (DE
- 6 5), and
- 7 • a letter from the Rubin Law Firm ("Rubin Letter") (DE 6).

8 ("Standing Documents" summarily herein). These arguments fail because (1)

9 each piece of evidence that Defendant relies on is inadmissible because

10 Defendant failed to comply with both the rules of Evidence and Civil Procedure;

11 (2) Bibby was never assigned any of the invoices between Plaintiff and

12 Defendant; (3) CCG was never assigned any of the invoices between Plaintiff and

13 Defendant; and (4) CCG was only assigned Plaintiff's future receipts.

14 **1. THE STANDING DOCUMENTS WERE NOT**

15 **PRODUCED AS REQUIRED AND MUST BE EXCLUDED.**

16 *a) DEFENDANT HAD MULTIPLE OPPORTUNITIES*

17 *AND FAILED TO PROVIDE THE STANDING*

18 *DOCUMENTS.*

19 Despite having been required to and having had the opportunity to produce

20 the Standing Documents on a multitude of occasions, Defendant never did. As a

21 result, Defendant is barred from the introduction of this evidence at this stage.

22 Under FRCP § 26(a)(1)(A)(ii), a party must provide "(ii) a copy-or a

23 description by category and location-of **all documents**, electronically stored

24 information, and tangible things that the disclosing party has in its possession,

25 custody, or control and may use **to support its claims or defenses**, unless the use

26 would be solely for impeachment." FRCP § 26(a)(1)(A)(ii) [Emph. Added]. In

27 subsequent discovery, Plaintiff requested from Defendant all documents that

28 supported its defenses. (*See Declaration of Joseph M. Liu*)

Disclosures under Rule 26(a) and responses to Interrogatories, Requests for Production, and Requests for Admission must be supplemented or corrected in a timely manner if the responding or disclosing party learns that the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. Fed. R. Civ. P. § 37. This continuing disclosure applies to evidence discovered or coming into a party's possession after an earlier document request for such documents. *See United States v. Boyce* (SD CA 2001) 148 F.Supp.2d 1069, 1088.

Here, Defendant's answer alleges that Plaintiff lacked standing as an affirmative defense. Thus, the Defendant had two opportunities – both under initial disclosures and under discovery responses - and a continuing duty to produce the required documents to substantiate its defense of standing prior to the court ordered non-expert discovery cut-off on October 19, 2018.

However, the Defendant never produced the Standing Documents. (*See Declaration of Joseph M. Liu*) It is too late for the Defendant to now rely on these documents.

*b) DEFENDANT'S FAILURE TO PRODUCE THE
STANDING DOCUMENTS BARS THEM FROM
INTRODUCING THE EVIDENCE NOW.*

"If a party fails to provide information... as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence **on a motion, at a hearing, or at a trial**, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. § 37. [Emph. Added].

The decision to produce documents at such a late stage in litigation is "a last second trial-by-ambush tactic, which simply can not be permitted in modern federal practice." *Royalty Petroleum Co. v. Arkla, Inc.* (W.D. Okla. 1990) 129 F.R.D. 674, 678. When documents are not timely produced, Rule 37(c)(1) is

1 “self-executing” and “automatic.” Yeti by Molly Ltd v. Deckers Outdoor Corp.
 2 (9th Cir.2001) 259 F.3d 1101, 1106. Once non-compliance is shown, the burden
 3 is on the party who failed to comply to demonstrate that it meets one of the two
 4 exceptions to mandatory sanctions. Jones v. Travelers Cas. Ins. Co. of Am. (N.D.
 5 Cal. 2015) 304 F.R.D. 677, 679.

6 Defendant never introduced the Standing Documents. Given that,
 7 Defendant had a duty to establish exactly why its failure to produce was not
 8 substantially justified or harmless. Defendant failed to do so. While this may not
 9 be “trial by ambush,” it most certainly is “opposition by ambush.” Accordingly,
 10 the documents must be excluded and cannot be relied on in determining
 11 Defendant’s defenses.

12 **2. THE STANDING DOCUMENTS ARE INADMISSIBLE**
 13 **BECAUSE DEFENDANT FAILED TO COMPLY WITH THE**
 14 **RULES OF EVIDENCE.**

15 In addition to the Federal Rules of Civil Procedure, the Standing
 16 Documents must be excluded because the Defendant has failed to comply with
 17 the Federal Rules of Evidence. Namely, the documents are inadmissible because
 18 (1) Defendant has not laid the proper foundation for their admissibility; (2) the
 19 documents constitute inadmissible hearsay.

20 *a) DEFENDANT FAILED TO LAY PROPER*
 21 *FOUNDATION FOR EXHIBITS 4 THROUGH 6 AND THEY*
 22 *CONSTITUTE HEARSAY*

23 Under FRCP 901(a) “[t]o satisfy the requirement of authenticating or
 24 identifying an item of evidence, the proponent must produce evidence sufficient to
 25 support a finding that the item is what the proponent claims it is.” This can include
 26 “Testimony that an item is what it is claimed to be” FRCP 901(b)(1)

27 Here, Exhibits 4-6 are inadmissible because the Defendant did not lay proper
 28 foundation. All that is set forth is a declaration from Defendant’s lawyer that these

documents were “produced in discovery in this case” (*see Paragraphs 5-7 of Declaration of Harlan Lazarus in Support of Opposition to Summary Judgment*) Such evidence is insufficient to authentic these three exhibits. There were no statements as to when, where and from whom the Defendant obtained these documents. They were not produced by the Plaintiff (*see Declaration of Joseph M. Liu*) and, if they were produced pursuant to a subpoena, there was no evidence showing any sort of authentication from the producing party or its custodian of records.

"Hearsay" is a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. FRCP § 801(c). Hearsay is inadmissible unless provided by (1) a federal statute, (2) these rules, or (3) other rules prescribed by the Supreme Court." FRCP § 802. The Standing Documents are all hearsay.

In its Opposition, Defendant relies on the Agreement for Sale to stand for the proposition that Plaintiff assigned to CCG a Specified Percentage of the proceeds of each future sale made by Plaintiff. [Defendant’s Opp. Pg. 6 lns. 8-16]. Defendant *explicitly* relies on that to show that a portion of the funds that Plaintiff were to receive from Defendant were assigned to CCG. Hence, the document constitutes hearsay.

The Financing Statements fail for the same issue. The Financing Statements states that each and every single one of Plaintiff’s assets constitute collateral in favor of CCG. Defendant holds this language to indicate that CCG has a lien on Plaintiff’s assets. [Reply to Opp. Pgs. 6:25 – 7:1]. Accordingly, it stands for the truth of the matter asserted, and, again, constitutes hearsay.

The Rubin Letter follows suit. Defendant relies on the Rubin Letter to stand for the proposition that Plaintiff sold, assigned, and transferred to CCG a certain percentage of its future receivables and that it directed Defendant to make

1 payment directly to CCG. [Reply to Opp. Pgs. 6: 3-6]. In identical language, the
 2 Rubin Letter specifically states that Interworks has “sold, assigned and
 3 transferred to CCG a certain percentage of its future receivables.” Accordingly,
 4 the Rubin Letter offers to prove the truth of the matter asserted.

5 Defendant is attempting to use the truth of the matter asserted in the
 6 Standing Documents to create a triable issue of fact. However, Defendant has not
 7 made a single attempt to ensure that these conform to the evidentiary
 8 requirements and the relevant hearsay exceptions, and they have not made any
 9 efforts because it would be meritless. Accordingly, the Standing Documents are
 10 inadmissible to support Defendant's Opposition.

11 **3. BIBBY HAD AN OPTION TO BUT NEVER ACCEPTED** 12 **THE ASSIGNMENT OF DEFENDANT’S ACCOUNTS.**

13 Defendant argues that the Master Purchase and Sale Agreement between
 14 the Plaintiff and Bibby supports its contention that Defendant’s account was
 15 assigned to Bibby. But the document speaks for itself. It says that Bibby “shall
 16 have the **option** to purchase from and [Interworks] shall assign and offer to
 17 [Bibby], as [Intework’s] sole and exclusive **factor**” Plaintiff’s account
 18 receivables. [Emph. Added]. The key word is “option.” Bibby, Plaintiff’s factor,
 19 had the option to purchase Plaintiff’s account receivables. Until then, it was just
 20 that - an option. Bibby never exercised the option to purchase any accounts
 21 receivables due Plaintiff from Defendant. (*See below and Declaration of Eric Lu*)

22 *a) IT IS UNQUESTIONED AND DEFENDANT KNEW*
 23 *THAT BIBBY REJECTED AND NEVER EXTENDED*
 24 *CREDIT TO THE DEFENDANT.*

25 In reliance on language that was stamped on the invoices, Defendant’s
 26 Opposition states that the invoices in question were assigned to Bibby. [Opp. 5:6-
 27 21]. Bibby, once Plaintiff’s factor, was requested to extend credit coverage on a
 28 few invoices issued to the Defendant. To do so, the Plaintiff needed to forward

1 those invoices to Bibby with the stamp indicating the assignment if and when
2 Bibby agreed to provide credit coverage.

3 Regardless of what the invoices say, it is unquestioned that Bibby
4 categorically refused to extend credit to Defendant and never accepted the
5 invoices. It is astonishing that Defendant can now, in good faith, raise this
6 argument given that *Bibby specifically informed them of their rejection*. On
7 February 14, 2017, Plaintiff and Defendant received an email from Bibby
8 specifically concerning the request to assign the account receivables to Bibby and
9 the rejection thereof. The email states, verbatim:

10 ...Based on the information she received, she won't be able to extend
11 coverage on Digital Gadgets.

12 (*See Declaration of Eric Lu ¶11 and attached Exhibit A*) Shortly thereafter, on
13 March 1, 2017, Eric Lu sent Defendant an email effectively memorializing the
14 Bibby rejection. The March 1, 2017 email states, in relevant part,

15 I gave you guys 60days on the lower cost **which I have to carry**
16 **the AR**

17 [Emph. Added] (*See Exhibit 17 of Defendant's Opposition*) Lu was specifically
18 acknowledging that and Defendant understood that Bibby rejected Defendant's
19 application.

20 Defendant raising the argument that their account was assigned to Bibby is
21 disingenuous and frivolous. Defendant knew that their account was never
22 assigned to Bibby. Defendant was made aware on at least two separate occasions
23 that Bibby rejected extensions to Defendant. Thus, as Plaintiff stated during
24 deposition, the invoices were never assigned to Bibby.

25 In addition, Defendant's legal authority does not support its position.
26 Defendant relies on Alpi Int'l, Ltd v. Anga Supply, LLC (N.D. Cal. 2015) 118 F.
27 Supp. 3d 1172, 1176 to stand for the proposition that the invoices speak for
28 themselves and create issues of fact barring summary judgment. A cursory

review of Alpi reveals that Alpi has no bearing on this matter whatsoever. Alpi addresses a copyright infringement issue wherein the two parties, competitors who manufactured and sold “stress reliever toys,” each moved for summary judgment based on copyright infringement claims. Id. at 1174. The court specifically stated that copyright infringement inquiries require a two-part extrinsic/intrinsic test, with the extrinsic part consisting of examining similarities between the copyrighted and challenged works. Id. at 1176. Thus, the court was examining two different products to determine whether or not they, on their face, showed enough differences to constitute a triable issue of fact for purposes of summary judgment on a copyright infringement issue.

Defendant is attempting to take Alpi’s ruling an undeserved step forward. The court was examining two items for differences, the characteristics of which had huge consequences. Here, we have a single document – the invoices with stamps on them – that Defendant is attempting to afford an interpretation that it is very well aware is not accurate. To bring it into Alpi’s orbit, it would be akin to one of the parties stating that they, in fact, infringed on the other party’s design.

4. PLAINTIFF’S RIGHT TO COLLECT FUNDS WAS NEVER ASSIGNED TO CCG.

Defendant claims that the accounts receivable associated with Defendant’s accounts were assigned to CCG, citing the Agreement for Sale and the Rubin Letter in support. Opp. Page 6 lns 3-7. Defendant totally and completely mischaracterizes the terms of the Agreement for Purchase and Rubin Letter.

a) CCG WAS ASSIGNED AS A POWER OF ATTORNEY, NOT AN ASSIGNMENT OF THE DIGITAL GADGETS, LLC ACCOUNT, AND THEREFORE PLAINTIFF STILL HAS STANDING.

The exact language of Section 5 of the CCG Agreement, dated January 12, 2017, states that “[Interworks] irrevocably appoints [CCG] as its **agent** and

1 **attorney-in-fact** with full authority to take any action or execute any instrument
 2 or document...” [Emph. Added]. The Rubin Letter, sent subsequent to the
 3 Agreement for Purchase, states
 4 (CCG) and (Plaintiff) have entered into that certain (Agreement for
 5 Purchase), dated January 12, 2017...a copy of which is enclosed with
 6 this letter. Pursuant to the language of the Merchant Agreement...
 7 Thus, any rights exercised from the Rubin Letter were derived under the
 8 Agreement for Purchase.

9 By its terms, the Agreement for Sale transfers an appointment of an agency
 10 and attorney-in-fact. “An attorney in fact is one who is given authority by his
 11 principal to do a particular act not of a legal character. The term “‘attorney in
 12 fact’ is, in loose language, used to include agents of all kinds, but in its strict
 13 legal sense it means an agent having a special authority created by deed.” People
 14 By & Through Dep’t of Pub. Works v. Malone (Ct. App. 1965) 232 Cal. App. 2d
 15 531, 536. Thus, CCG’s rights as to Plaintiff are dictated by the laws of agency.

16 The very definition and rules of agency are instructional. “An agent is one
 17 who represents another, called the principal, in dealings with third persons.” Cal.
 18 Civ. Code § 2304. An agent represents his principal for all purposes within the
 19 scope of his actual or ostensible authority, and all the rights and liabilities which
 20 would accrue to the agent from transactions within such limit, if they had been
 21 entered into on his own account, accrue to the principal. Cal. Civ. Code § 2330.
 22 Based on that, it has been a hallmark of agency that “(a)n agent, ordinarily,
 23 cannot sue in his own name in respect to the subject-matter of his agency.”
 24 Lineker v. Ayeshford (1850) 1 Cal. 75. Rather, it is an axiom of agency that the
 25 right to sue lies in the hands of the principal. Hardy v. Hunt (1858) 11 Cal. 343,
 26 347.

27 As Plaintiff’s agent and/or attorney-in-fact, Plaintiff was CCG’s principal.
 28 CCG could only act on Plaintiff’s behalf. In acting on Plaintiff’s behalf, any

1 action must have been brought on Plaintiff's behalf, in Plaintiff's name.

2 Accordingly, Plaintiff was never stripped of standing.

3 *b) THE AGREEMENT FOR PURCHASE DOES NOT*
 4 *TRANSFER AN ASSIGNMENT OF RIGHTS TO CCG.*

5 Moreover, the CCG Agreement could not be clearer. What is transferred is
 6 the proceeds of certain "Future Receipts." The definition of Future Receipts,
 7 while lengthy, is limited to the following:

8 All payments made by cash, check, ACH or other electronic transfer,
 9 credit card, debit card, bank card, charge card (each such card shall be
 10 referred to herein as a "Payment Card") or other form of monetary
 payment in the ordinary course of Seller's business.

11 The only thing that is assigned are payments that are made to Plaintiff. What is
 12 *not* being assigned is the full account.

13 Defendant argues that the Rubin Letter creates a triable issue of fact with
 14 respect to standing. This is, again, befuddling. Defendant misconstrues the Rubin
 15 Letter to stand for the proposition that Plaintiff has transferred Defendant's
 16 account in its entirety to CCG. This is not the case.

17 The Rubin Letter states, in exact terms, that

18 (CCG) and (Plaintiff) have entered into that certain (Agreement for
 19 Purchase), dated January 12, 2017...a copy of which is enclosed with
 20 this letter. Pursuant to the language of the Merchant Agreement, the
 Merchant has sold, assigned and transferred to CCG a certain percentage
 21 of its future receivables...The terms of the Agreement (i) permits CCG
 22 to notify Digital Gadgets, LLC of the sale of receivables and to direct
 Digital Gadgets, LLC to make payment directly to CCG of all or any
 23 portion of the amounts received by Digital Gadgets, LLC and (ii)
 irrevocably appoints CCG as the Merchant's **agent and attorney-in-**
 24 **fact** with full authority to take any action or execute any instrument or
 25 document and to settle all obligations due to CCG, including collecting
 26 money and directing third parties to make payment to CCG in
 satisfaction of the amounts owed under the (Agreement for Purchase).

27 [Emph. Added]. The Rubin Letter rests the entirety of its authority in the
 28 Agreement for Purchase. The Agreement for Purchase, as stated above, in no way

1 assigns an account to CCG. Interestingly, at no time in the Rubin Letter does
 2 CCG claim any authority to bring an action against Defendant. The reasoning is
 3 simple – they never had the authority to. Any action would be brought by
 4 Plaintiff, in Plaintiff's name.

5 **5. ANY INTEREST THAT BIBBY OR CCG HAD WERE**
 6 **TERMINATED.**

7 Regardless, CCG and Bibby have both terminated their interests in any of
 8 Plaintiff's property. "Upon the filing of a termination statement with the filing
 9 office, the financing statement to which the termination statement relates ceases
 10 to be effective." Cal. Comm. Code § 9-513. On July 13, 2018, Bibby filed a UCC
 11 Financing Statement Amendment indicating that the that their previous financing
 12 statements had been terminated. (*See also Declaration of Eric Lu ¶14* [*"In or*
 13 *about July of 2018, the Plaintiff entered into a Buy-Out Agreement with Bibby in*
 14 *which the parties ceased doing business with each other."*]) And on July 25,
 15 2018, CCG filed a UCC Financing Statement Amendment indicating that their
 16 previous financing statements had been terminated. (*See Exhibit 3, Page 49 &*
 17 *Exhibit 5, Page 62 of Defendant's Opposition*) (*See also Declaration of Eric*
 18 *Lu ¶¶16,17* [*"In or about July of 2018, Cash Capital and Plaintiff entered into a*
 19 *settlement agreement that settled and terminated all claims and suits against*
 20 *each other."* and *"This settlement agreement superseded all previous agreements*
 21 *between the Cash Capital and the Plaintiff including, without limitation, the*
 22 *"Agreement of the Purchase and Sale of Future Receipt" that was entered into in*
 23 *or about January of 2017".*]) Accordingly, any interest is now firmly rooted in
 24 Plaintiff's hands. And it should be noted that the UCC Financing Statement filed
 25 by Bibby to reflect an assignment back in May of 2018 was simply an assignment
 26 from "Bibby Financial Services (CA), Inc." to "Bibby Financial Services, Inc."
 27 (*See Exhibit 3, Page 48*) In no way did this document reflect any assignment
 28 from the Plaintiff to Bibby.

1 **6. FINANCING STATEMENTS ARE NOT AN**
 2 **ASSIGNMENT.**

3 Plaintiff briefly raises issue with the Financing Statements filed by Bibby
 4 with the California Department of State. The Financing Statements allege the
 5 existence of “a lien on “all assets of [Interworks], now existing and hereafter
 6 arising, wherever located.” However, Defendant makes no effort to show how
 7 this would deprive the Plaintiff of standing.

8 A lien is a charge imposed in some mode other than by a transfer in trust
 9 upon specific property by which it is made security for the performance of an act.
 10 Cal. Civ. Code § 2872.0 A ““lien”, in its broadest sense and common acceptation,
 11 denotes a legal claim or charge on property, either real or personal, as security for
 12 payment of some debt or obligation.” Gray v. Horne (App. 2 Dist. 1941) 48
 13 Cal.App.2d 372. Typically, the creditor does not take possession of the property
 14 on which the lien has been obtained. LIEN, Black's Law Dictionary (10th ed.
 15 2014). The Defendant has failed to show how this lien can be construed as an
 16 assignment.

17 **7. DEFENDANT’S ARGUMENTS ARE A LAST-MINUTE**
 18 **HAIL MARY ATTEMPT.**

19 The totality of Defendant’s actions surrounding its argument for standing
 20 show exactly what this argument is: a last minute, hail mary attempt to avoid
 21 liability concocted by Defendant’s counsel. Defendant summarily failed to
 22 provide documents concerning standing. In deposition, nobody in Defendant’s
 23 camp went so far as to mutter the words “Cash Capital Group” and only
 24 mentioned Bibby in evasive terms.

25 Assuming that Defendant actually thought there was an issue with where
 26 the payments should be directed, more questions arise around Defendant’s
 27 actions. Why didn’t they pay CCG? Why didn’t they pay Bibby? Why didn’t they
 28 return the goods to either company? If they didn’t know where they should be

1 sent, why didn't they ask? To argue now that the reason no action was taken with
 2 regards to returning merchandise or submitting payment is because of
 3 questioning where to remit payment is disingenuous.

4 **C. DEFENDANT FAILED TO GIVE NOTICE.**

5 In an attempt to avoid the harsh consequences of the failure to comply with
 6 Cal. Com. Code 2607(3)(A), Defendant sets forth a litany of issues that attempt
 7 to show that "notice" was properly given. None of these arguments actually
 8 address the definition of notice; rather, they dance around, hoping to distract the
 9 court from the law. Accordingly, Defendant is not absolved of its liability.

10 **1. NOTICE IS AN OPPORTUNITY TO CURE, NOT**
 11 **MERE NOTIFICATION OF A POTENTIAL ISSUE.**

12 Defendant claims that adequate, timely notice was given as required under
 13 Cal. Com. Code 2607(3)(A) by stating that (1) Plaintiff has misconstrued the
 14 requirements of "notice" as requiring an opportunity to cure and (2) Plaintiff was
 15 on notice that there were issues as early as May 2, 2017.

16 California courts side with Plaintiff. The purpose of "notice" under this
 17 section is "to allow the seller the opportunity to repair the defective item, reduce
 18 damages, avoid defective products in the future, and negotiate settlements."
 19 Cardinal Health 301, Inc. v. Tyco Elecs. Corp. (2008) 169 Cal. App. 4th 116,
 20 135. In Oddo v. Arcoaire Air Conditioning & Heating, 2017 WL 372975, at *7
 21 (C.D. Cal. Jan. 24, 2017), the court *expressly* stated that "The laws of
 22 California...require consumers to provide the manufacturer with an opportunity
 23 to cure a failure to comply with a warranty before the consumer may bring an
 24 action for breach of warranty... Cal. Com. Code § 2607(3)(A) ("The buyer must,
 25 within a reasonable time after he or she discovers or should have discovered any
 26 breach, notify the seller of breach or be barred from any remedy")." When two
 27 parties are merchants, "the essential content of the notice must set forth the
 28 nonconformity in the goods materially impairing their value to the buyer. The

1 content must also inform the seller that the buyer does not wish to keep the
 2 goods. Carson Indus., Inc. v. Am. Tech. Network, Corp. (N.D. Cal. Sept. 26,
 3 2015) 2015 WL 12661953, at *4. In Carson Indus., Inc. the court *specifically*
 4 held that a buyer's failure to inform a seller that they intended to either return the
 5 goods or submit them for repair with a third party, barred relevant claims.

6 Defendant attempts to rely on Cardinal to show that an opportunity to cure
 7 is not required by pointing out that Cardinal dismissed a lawsuit based on the fact
 8 that notice was not given prior to the lawsuit, not based on an opportunity to cure.
 9 Defendant is again misguided. In Cardinal, the court was not required to
 10 determine whether not there was an opportunity to cure because the threshold
 11 requirement was not met – specifically, the seller had *no idea* that the goods were
 12 subject to some sort of deficiency. The standard that Defendant seemingly puts
 13 on Cardinal's seller is preposterous – how could an opportunity to cure be
 14 provided without actual knowledge of a deficiency?

15 Defendant calls the opportunity to cure “merely a policy discussion.” [Opp.
 16 Pg.10 20-21]. Assuming, arguendo, that this *is* a policy argument, it is still
 17 uncontroverted that Defendant failed to comply with the policy rationale behind
 18 the notice requirement. More than just the failure to return, there was an *outright*
 19 *refusal* by Defendant to return the goods.

20 **2. DEFENDANT IS BARRED FROM REMEDY UNDER** 21 **ITS BREACH OF WARRANTY CLAIMS.**

22 Defendant addresses notice twice, once specifically with respect to its
 23 application to Defendant's Breach of Warranty claims. Defendant again claims
 24 that Plaintiff has misconstrued the requirements of Cal. Com. Code § 2607(3)(A)
 25 to require that a purchaser must allow a seller to repair its breach. As elaborated
 26 above, this argument is nonsensical. Courts require the opportunity to cure.

27 Defendant also claims that Plaintiff has not expressed how Defendant
 28 failed to comply with the elements of a Breach of Express Warranty claim. This

1 is bewildering. As stated in Plaintiff's Memorandum, the "essential elements" for
 2 breach of an express warranty are "(1) an express warranty...to repair defects
 3 given in connection with the sale of goods; (2) the existence of a defect covered
 4 by the warranty; (3) the buyer's notice to the seller of such a *1334 defect within
 5 a reasonable time after its discovery (*id.*, § 2607, subd. (3)(A)); (4) the seller's
 6 failure to repair the defect in compliance with the warranty; and (5) resulting
 7 damages." Orichian v. BMW of N. Am., LLC (2014) 226 Cal. App. 4th 1322,
 8 1333–34. The elements require notice, subject to 2607(3)(A). The definition of
 9 notice has been elaborated ad nauseum above, and it is unquestioned that Plaintiff
 10 was not given an opportunity to cure.

11 **3. DEFENDANT THROWS IN IRRELEVANT SMOKE**
 12 **SCREENS IN AN ATTEMPT TO AVOID THE TRUE ISSUE**
 13 **OF NOTICE.**

14 Undoubtedly understanding that the issue of notice is unavoidable,
 15 Defendant tries to escape liability by throwing in a number of smoke screens in a
 16 valiant, albeit meritless, effort to misguide the court.

17 *a) ATTEMPTS AT REPAIRING THE GOODS*

18 Defendant tries to avoid liability by stating that Plaintiff had no interest in
 19 repairing the nonconformity, pointing to Plaintiff's emails that reference the
 20 manufacturing company. Conveniently, Defendant ignores the fact that Plaintiff
 21 went a step beyond offering to repair the hoverboards – the Plaintiff requested the
 22 return of the hoverboards, which Defendant outright refused to do. The truth is,
 23 Defendant had no desire to return the goods.

24 *b) INFORMATION NECESSARY TO CONSUMMATE A*
 25 *DEAL WITH QVC*

26 Defendant claims that Plaintiff refused to provide necessary information to
 27 help consummate a deal with QVC. That is wholly irrelevant for purposes of
 28 notice. Defendant had a responsibility to give notice of the defect, which they did

1 not do. Defendant's position here, though, raises a perplexing question; if the
 2 goods did not conform, then why would they want to consummate the
 3 transaction?

4 *c) REQUESTS TO INSPECT THE HOVERBOARDS*

5 Finally, Defendant states that Plaintiff never asked to inspect the
 6 hoverboards. First and foremost, Defendant has not pointed out any legal support
 7 for its position that Plaintiff was required to asked to inspect the hoverboards, nor
 8 will it be able to. More to the point, though, this argument is nothing short of
 9 bewildering, and can only cause Plaintiff to throw its hands up in despair.
 10 Defendant is somewhat right – the Plaintiff didn't request an inspection. But, at
 11 that same end, the Defendant ignores that Plaintiff requested their return, and
 12 suppress the fact that Defendant refused to do so. The onus is on the Defendant to
 13 provide for an opportunity to cure.

14 What and how was Plaintiff supposed to do to remedy the situation?
 15 Defendant essentially handcuffed the Plaintiff by failing to allow for the return of
 16 the goods. Defendant failed to give proper notice of the alleged nonconformity by
 17 failing to provide for an opportunity to cure and is now barred from ANY
 18 recovery.

19 **D. NO EXCLUSIVITY AGREEMENT EXISTS**

20 Defendant attempts to maintain its claims to an exclusivity agreement by
 21 stating that (1) an exclusivity agreement exists by course of dealings, that (2)
 22 Plaintiff acknowledged the existence of an arrangement, and that (3) promissory
 23 estoppel applies. These arguments summarily fail.

24 **1. "COURSE OF DEALINGS" CANNOT FORM THE**
 25 **BASIS OF AN EXCLUSIVITY AGREEMENT BECAUSE THE**
 26 **CONTRACT FALLS WITHIN THE STATUTE OF FRAUDS.**

27 Defendant claims that the exclusivity agreement was formed via parties'
 28 course of dealings. As set forth in Plaintiff's Memorandum, an "Exclusive

Dealings” contract, as defined by Cal. Com. Code § 2306(2), must be in writing when it involves a sale of goods over \$500. Cal. Com. Code § 2201; *see Mozaffarian v. Breitling U.S.A., Inc.* (N.D. Cal. Nov. 19, 1998) 1998 WL 827596. Defendant has seemingly ignored Plaintiff’s argument. There was no written agreement here, and Defendant cannot escape those consequences.

**2. CAL. COM. CODE § 2201(b) IS INAPPLICABLE
BECAUSE DEFENDANT NEVER ACKNOWLEDGED THE
EXISTENCE OF AN EXCLUSIVITY AGREEMENT.**

Defendant attempts to rely on Cal. Com. Code § 2201(b) to bring the exclusivity agreement outside the purview of the statute of frauds, by claiming that an exception exists when a party admits the existence of a contract. The relevant portions of § 2201 state that

A contract which **does not satisfy the requirements of subdivision (1)** but which is valid in other respects is enforceable...

(b) If the party against whom enforcement is sought admits in his or her pleading, testimony, or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted.

[Emph. Added.] The referenced Subdivision 1 states

Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars (\$500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker.

*a) PLAINTIFF NEVER ACKNOWLEDGED THE
EXISTENCE OF AN EXCLUSIVITY AGREEMENT.*

If the Plaintiff’s admission of the existence of an exclusivity agreement would save Defendant’s cause of action, it makes no difference – the Defendant has failed to point to a single article of evidence showing that Plaintiff acknowledged an exclusivity agreement. Throughout its argument, Defendant avers to the allegation of an “arrangement” between the parties as evidence of the

1 existence and admission of an exclusivity agreement. Defendant relies on 2
 2 documents in support of its position of an “arrangement”: the Declaration of Eric
 3 Lu (“Lu Decl.”) and an email dated March 1, 2017.

4 Lu’s Declaration states the following:

5 12. Plaintiff, however, did not have the ability to “drop ship” the
 6 hoverboards to QVC’s customers.

7 13. Thus, in or about December of 2016, Plaintiff decided to
 8 enter into an arrangement with Defendant Digital Gadgets, LLC.
 9 (“Defendant”), who said they had the ability to drop ship with
 10 QVC.

11 14. In that arrangement, the Defendant would purchase the
 12 Model C’s from the Plaintiff. QVC’s customer would then
 13 purchase the boards from QVC and then the Defendant would
 14 ship the boards directly to QVC’s customer.

15 Lu Decl. Page 3, ¶ 12-14, lns 12-19. The entirety of the “arrangement” or
 16 agreement between the parties is contained in the Declaration of Eric Lu. What
 17 Plaintiff acknowledged is the sale of hoverboards and the inability to drop ship.
 18 Plaintiff never acknowledged an exclusivity agreement.

19 The March 1, 2017 Email is similarly hopeless for Defendant. The entirety
 20 of the email says

21 I gave you guys 60days on the lower cost which I have to carry
 22 the AR and if you're going to paid 99k, that is not acceptable, I
 23 could have sold those inventory to other accounts. Janet had
 24 requested that I work with you guy and in good faith, I gave you
 25 QVC and Zullilly...I have tried to work with you guys, but I feel
 26 like I'm getting the short end of the stick...

27 Please ship all goods back to me...as I cannot tie up my funds
 28 and wait for weekly reports/payments.

I need to know how many units you have now and I will have my
 team schedule the pick up immediately.

Eric

(sic). What we have is a desperate plea to bring an account forward. Nothing in
 this email admits an exclusivity agreement or arrangement. To be clear, the only
 individual who has acknowledged an exclusivity agreement here is Charlie

1 Tebele. Tebele Transcript, p. 39, ¶¶ 6-13; Opp. Pg. 13, lns 10-14. Plaintiff never
 2 acknowledged an exclusivity agreement, and Defendant's statements cannot
 3 unilaterally bring them within the purview of § 2201.

4 **3. DEFENDANT CANNOT SHOW A BASIS FOR**
 5 **PROMISSORY ESTOPPEL.**

6 As a last gasp effort, Defendant attempts to throw in an argument that
 7 promissory estoppel should uphold the alleged exclusivity agreement. Again,
 8 Defendant's own words destroy any chance it has at success.

9 The elements of a promissory estoppel claim are "(1) a promise clear and
 10 unambiguous in its terms; (2) reliance by the party to whom the promise is made;
 11 (3)[the] reliance must be both reasonable and foreseeable; and (4) the party
 12 asserting the estoppel must be injured by his reliance." *US Ecology, Inc. v. State*
 13 *of California* (2005) 129 Cal. App. 4th 887, 901. Estoppel applies "where an
 14 unconscionable injury would result from denying enforcement after one party has
 15 been induced to make a serious change of position in reliance on the contract or
 16 where unjust enrichment would result if a party who has received the benefits of
 17 the other's performance were allowed to invoke the statute." *In re Baglione's*
 18 *Estate* (1966) 65 Cal. 2d 192, 197–98.

19 *a) DEFENDANT CANNOT SHOW UNCONSCIONABLE*
 20 *INJURY.*

21 As a preliminary matter, estoppel does not apply in this situation as
 22 Defendant has not shown a serious change of position in reliance on the contract
 23 and has not shown unjust enrichment. Nor will it be able to. Defendant bases its
 24 claims of unconscionable injury on the fact that they allegedly could not fill the
 25 2016 QVC orders. Opp. Pg. 15 lns 15-17. QVC has testified that Digital Gadgets
 26 hoverboards were sold well beyond June, 2016 and were sold until they were sold
 27 out. Deposition of Meghan Kane, Page 31, Lines 4-24 through Page 32, Lines 1-
 28

1 5. Charlie Tebele, on the other hand, testified that they stopped selling
2 hoverboards to QVC in June, 2016. Declaration of Charlie Tebele, ¶ 41.

3 Either scenario precludes promissory estoppel. If QVC is telling the truth
4 and Charlie Tebele is lying, Digital Gadgets received a large amount of money
5 and sold hoverboards throughout 2016. On the other hand, if, as the Defendant
6 would have you believe, Charlie Tebele is telling the truth and QVC is lying and
7 manufacturing spreadsheets evidencing the sales of Digital Gadgets products,
8 then Digital Gadgets is still in possession of over a million dollars' worth of
9 hoverboards. More to the point, there is no way of showing that Plaintiff has been
10 unjustly enriched – Plaintiff has lost goods and received no consideration
11 whatsoever in return. Defendant cannot show unconscionable injury under any
12 circumstance.

13 *b) NO CLEAR AND UNAMBIGUOUS PROMISE EXISTS*
14 *CONCERNING AN EXCLUSIVITY AGREEMENT.*

15 Further, there was no clear and unambiguous promise that Defendant was to
16 fill the shoes of Plaintiff as the exclusive seller of hoverboards. Defendant
17 testified that there was a “certain agreement” between the two. When was that
18 agreement made? Where? Was it in writing? Do any emails confirm the
19 existence? If they do, Defendant has not pointed to their existence. To that same
20 effect, Plaintiff has denied the very existence of *any* exclusivity agreement.

21 **E. DEFENDANT HAS SHOWN NO BASIS FOR ENTITLEMENT**
22 **TO OFFSET.**

23 Plaintiff set forth arguments showing that Defendant is not entitled to
24 offset because (1) the amounts sought had not yet matured, and (2) Defendant
25 failed to give notice pursuant to Cal. Com. Code § 2607(3). Without addressing
26 any of Plaintiff's actual arguments, Defendant makes the conclusory statement
27 that Defendant is entitled to offset. Defendant has done absolutely nothing to
28 counter these arguments. The question remains – what offset is Defendant

1 entitled to? No amounts have been shown to be losses, and no notice was given
 2 pursuant to Cal. Com. Code 2607(3). Accordingly, there is no ability for
 3 Defendant to obtain offset.

4 **F. DEFENDANT HAS NO EXCUSES FOR FAILING TO**
 5 **COMPLY WITH THE COMMERCIAL CODE AND IS BARRED**
 6 **FROM RECOVERY BECAUSE DEFENDANT ACCEPTED THE**
 7 **GOODS.**

8 Perhaps most relevant, Defendant fails to address the most crucial part of
 9 the law. As set forth at length in Plaintiff's Memorandum, a buyer must pay at
 10 the contract rate for any goods accepted. Cal. Com. Code § 2301. Defendant
 11 failed to reject the goods, the Defendant resold the goods, and the Plaintiff never
 12 revoked its acceptance. Nowhere in its Opposition does Defendant deny those
 13 allegations. Accordingly, the goods have been accepted, and Defendant is liable
 14 for the contract rate.

15 **III. CONCLUSION**

16 For the reasons set forth above, Summary Judgment must be entered in
 17 Plaintiff's favor.

18 Date: December 26, 2018

By: /s/ Joseph M. Liu, Esq.
 Joseph M. Liu, Esq.
 Attorneys for Plaintiff/
 Counter Defendant
 Interworks Unlimited, Inc.